

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

FLORENCE LILLIAN FLUMERFELT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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JURISDICTION

The jurisdiction of the District Court is conferred by the provisions of Section 1331, Title 8 U.S.C., and on this Court by Section 1291, Title 28, U.S.C.

STATUTE INVOLVED

Section 1427 of Title 8, U.S.C. provides in part as follows:

(a) No person * * * shall be naturalized unless such petitioner * * * during all the period referred to in this subsection has been and still is a person of good moral character * * *

STATEMENT

Appellant's petition for naturalization was denied by the District Court on November 17, 1954. The Court by its order (R. 7) adopted the recommendation of the Naturalization Examiner, R. S. Sullivan (R. 8), that the petition be denied, "For failure to establish good moral character for the period required by law."

Appellant, a native of Canada, was admitted to the United States on April 5, 1948; thereafter she filed her petition for naturalization on June 1, 1953.

The only evidence on behalf of appellant in this case consists of the Petition for Naturalization, with attached affidavits from two witnesses, the transcript of appellant's interrogation before Immigration and Naturalization examiners, Sullivan and Miller, on February 9, 1954 (beginning R. 12) and again the transcript of her testimony before the District Court

on November 15, 1954 (beginning R. 12). Apart from the two affidavits mentioned above, no testimony in her behalf was received from any person other than appellant.

The only issue in the case is whether or not the District Court in its denial of appellant's application, on November 17, 1954, on the grounds of lack of proof of good moral character, abused its discretion.

A discussion of the evidence in some detail will be found *infra*.

SUMMARY OF ARGUMENT

Naturalization has been thoroughly established as a privilege and not a right. Annotation 22 A.L.R. 2d 244 at 248, Section 3 and cases cited therein. The burden of establishing good moral character within the meaning of the statute is on the petitioner. (Annotation *supra*) What positive evidence of good moral character has appellant supplied? No testimony was furnished by any persons other than appellant, save for the very general affidavits supplied with the original petition. On the contrary, apart from the admitted single occasion for illicit relations (R. 34), which appellant now artfully argues as showing honesty and good character, there is much other evidence which, when considered as a whole, supports a reasonable

presumption that appellant's life for the five years in question was far from meeting the required moral standards. What the District Court had to consider was the weight of the unfavorable inferences stemming from appellant's testimony, in contrast to the almost complete lack of favorable inferences.

It was argued in one case that citizenship could be granted on character evidence of a purely negative character, neither good nor bad, amounting at most to a claim that the mere passage of time has made a person worthy of citizenship. However, the court said that citizenship is not a price awarded for mere survival. *Petition of Gabin*, 60 F. Supp. 750 (1945, D.C. Cal.)

Appellee further contends that even though the District Court has discretion to consider the evidence, the Court would have committed clear error if appellant's character had been found adequate under a consideration of all the evidence presented in this case.

THE EVIDENCE

At the Immigration and Naturalization Service examination on February 9, 1954 (R. 12), appellant testified to having worked at various Chinese restaurants in Seattle, Washington, at one of which she had met a Chinese-American by the name of James Wong.

Apparently in May of 1953 appellant moved from a boarding house in another part of Seattle to the Terrace View Hotel, which according to appellant's own testimony (R. 17) was known in Chinatown as a second-rate hotel and, as she had also heard, a house of prostitution. Her reason for moving there was the fact (R. 14) that she knew quite a few people there. It then appeared on further questioning that she only knew, by name at least, James Wong and one other man (R. 15). At all times since moving to that hotel she had occupied a room adjoining that of James Wong, a married man, with whom she very easily (R. 19) admitted a sexual relationship of a vague character.

Testifying in Court on November 15, 1954, that relationship was explained, apparently after reflection (R. 34 and 35), to have occurred on only one occasion and that at a time prior to appellant's moving next door to Mr. Wong and without knowledge of his marital status. It is interesting to note the explanation made before the District Court of this lapse which was left completely unexplained before the Immigration and Naturalization Service examiners.

In connection with the above testimony in regard to the adjoining rooms, the testimony of Immigration and Naturalization Service Investigator Miller is significant. He testified (R. 40) that the door

from appellant's room to Mr. Wong's room was only locked with a bolt on Mr. Wong's side. That situation, coupled with the inference stemming from Miller's observation of Mr. Wong's unused bed, is significant. Mr. Miller further testified to the general reputation of the Terrace Hotel (R. 41, 42).

The remaining testimony is either negative or unfavorable in character. Appellant's membership in bottle clubs was noted (R. 36). Also her statement that "I have a drink with anyone" (R. 18). Such evidence is not conclusive evidence of bad moral character but unexplained and unrebutted by any real evidence tending to show good moral character is clear support for the Court's ruling below.

ARGUMENT

As previously cited, appellant must prove "good moral character" as required by 8 U.S.C. 1427(a). It is admitted, as appellant argues, that the term is not one of technical, legal connotation but is to be viewed in the light of prevailing standards of society. Appellant cites *Application of Barug*, 76 F. Supp. 607, where it was held that an obviously good faith marriage which was immediately corrected after the defect was made known was not a flaw resulting in "poor moral character." The difference in the intent of the parties

in that case and the instant case is so obvious as to need no comment. It should also be noted, however, that this was not an appellate case and hence it has no bearing on the issue here, i.e., is there an abuse of the district judge's discretion?

Appellant subsequently treats the question of whether or not she had committed adultery. Apparently it is believed that because the petition for naturalization explains that as a matter of law one committing adultery cannot be of good moral character, that unless adultery is committed her character must be good. This is an obvious *non sequitur* and really immaterial as offered to prove good moral character. It is obvious that all persons who do not commit adultery are not necessarily of good moral character in regard to sexual habits.

The same reasoning contains when considering the quotations of what is considered an "Entry for Immoral Purposes" (Appellant's brief, p. 9, citing the *Monthly Review* of the Immigration and Naturalization Service). A lack of immoral purpose for a limited time is not equivalent to a showing of "good moral character."

The remainder of appellant's brief is devoted to the proposition that one act of sexual indiscretion is not sufficient to show lack of "good moral character"

particularly where such act is allegedly frankly admitted. Assuming, as in *United States v. Rubia*, 110 F. 2d 92 (C.A. 5, 1940 Fla.), where the district court found that petitioner's *prima facie* showing of good character by six honorable discharges was not overcome by his admission that he was living with a married woman separated from her husband, that in the instant case there had been strong evidence of petitioner's good moral character, then it might have been within the discretion of District Judge Lindberg to have overlooked appellant's "single" indiscretion. However, appellant's indiscretion was revealed in an evasive manner and cannot be considered as clearly a single occasion. In fact, a strong presumption arises that it was a continuing status carried on "sub rosa" because of the situation at the Terrace View Hotel. Additionally, what in the instant case is the evidence showing good moral character?

Appellant's only real authority is *Schmidt v. United States*, 177 F. 2d 450 (2d Cir.), where an unmarried male admitted engaging now and then in acts of sexual intercourse with unmarried women. The court held that such lapses did not show he was not a person of good moral character. The court very clearly stated that the only question in the case was whether by the above admission the alien showed that he was not a person of good moral character.

In the instant case the question is much broader; namely, has appellant made a showing of good moral character which is sufficient to overcome the doubts raised by her place of residence and the implications from her admitted indiscretion. Again in the instant case we have the sexual indiscretion of a woman and not a man. The distinction here may not be wholly rational and yet it is generally understood that the sexual morality of women is to be considered more strictly than that of unmarried men. This double standard is a social fact of life, understood by all persons, and as the Fourth Circuit said in *Marcantonio v. United States*, 185 F. 2d 934, "the test which the statute prescribes is good moral character as that term is generally understood, not the judge's idea of the type of man who ought to be admitted to citizenship."

In *Palkovitz Petition*, 67 Pa. D. and C. 319 (1949), among other issues, the court pointed out that the petitioner had worked for one employer for 45 years and reasoned that the court should balance misdeeds with good deeds.

In conclusion, the annotation in 22 A.L.R. 2d 244, at page 246, presents a concise statement of the principles involved, as follows:

It has been frequently stated, and without dissent, that the purpose of the naturalization statutes is to admit to citizenship those aliens who,

having met other requirements, it appears will make good American citizens. Consequently, the courts agree that naturalization is a matter of grace, not of right, a privilege to be granted only upon compliance with all the terms prescribed by the Congress; that the good moral character requirements continue up to and including the date of final hearing upon the petition for naturalization; that the petitioner has the burden of proving good moral character; and that all doubts as to his good moral character must be resolved against the petitioner.

Appellant has presented no evidence of good moral character or other evidence that would show her as a desirable citizen. To the contrary, there is much evidence showing that her character is questionable at best, none of which was rebutted in the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

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